

THE OXFORD HANDBOOK ON

THE SOURCES OF
INTERNATIONAL
LAW

Edited by

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PART IV

THE REGIMES OF
THE SOURCES OF
INTERNATIONAL LAW

SECTION XX

SOURCES OF
INTERNATIONAL
HUMAN RIGHTS
LAW

CHAPTER 39

SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW

HOW GENERAL IS GENERAL INTERNATIONAL LAW?

SAMANTHA BESSON

I. INTRODUCTION

THE sources of international human rights law (IHRL) refer to the processes through which international human rights and duties are created and/or identified as valid norms of international law.¹ The sources of international legal human rights (ILHR)² should not be conflated with their moral

¹ See Samantha Besson, 'Theorizing the Sources of International Law', in Samantha Besson and John Tasioulas, eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 163–85, 169–70.

² I am not considering sources of the international *responsibilities* for human rights of other States (and subjects) than the human rights' duty-bearing States (e.g. Arts 55 and 56 of the 1945 Charter of the United Nations (UN Charter) (San Francisco, 26 June 1945, 1 UNTS 16)). On the distinction, see Samantha Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights—A

grounds,³ on the one hand, or with the moral grounds for their (legitimate) authority,⁴ on the other. Of course, the three questions are related,⁵ but are kept separate here for the sake of clarity.

A cursory survey of the practice of IHRL, to be deepened and assessed in the course of the chapter, reveals that its sources differ, at least *prima facie*, from those foreseen by the general rules of international law (and in particular those listed under Article 38 of the Statute of the International Court of Justice (ICJ)), on the one hand,⁶ or from those practised in other regimes of international law, on the other.⁷ Importantly, as we will see, the specificities of the sources of IHRL need not imply the existence of new sources distinct from those of general international law, but merely differences either in their proportion and relationship to one another (e.g. between general principles and custom or judicial law) or in some of their conditions (e.g. in the context of treaty reservations) and consequences (e.g. with regard to their norms' *erga omnes* or *omnium* scope). These differences may amount to derogations from the general regime of sources of international law, but also to mere divergences from the sources at play in other regimes albeit without derogation from the general regime. When differences amount to derogations, they may actually be justified, for instance, by reference to the *lex specialis* principle, to the 'object and purpose' of the norm (Article 31 (1) of the Vienna Convention on the Law of Treaties (VCLT)), or to the intent of the States parties.⁸ Others may not be justifiable, however, thus raising the question of the autonomy of IHRL as a self-contained regime of international

Quiet (R)Evolution', *Social Philosophy & Policy* 32 (2015): 244–68, 262. Contra: Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles', *Australian Yearbook of International Law* 12 (1992): 82–108, 98–9.

³ See Samantha Besson, 'Justifications of Human Rights', in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran, eds, *International Human Rights Law*, 2nd edn (Oxford: Oxford University Press, 2013), 34–52.

⁴ See Samantha Besson, 'The Legitimate Authority of International Human Rights: On the Reciprocal Legitimation of Domestic and International Human Rights', in Andreas Føllesdal, Johan Karlsson Schaffer, and Geir Ulfstein, eds, *The Legitimacy of International Human Rights Regimes* (Cambridge: Cambridge University Press, 2013), 32–83.

⁵ See Besson, 'Theorizing the Sources', pp. 173–9.

⁶ Statute of the International Court of Justice (ICJ) (San Francisco, 26 June 1945, 33 UNTS 993).

⁷ See also Simma and Alston, 'The Sources'; Rosalyn Higgins, 'Human Rights: Some Questions of Integrity', *Modern Law Review* 52 (1989): 1–21; Matthew Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', *European Journal of International Law* 11 (2000): 489–519; Christine Chinkin, 'Sources', in Daniel Moeckli et al., eds, *International Human Rights Law*, 75–95; Hugh Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2014), ch. VIII.2; Olivier De Schutter, 'The Emergence of International Human Rights', in *International Human Rights Law: Cases, Materials, Commentary*, 2nd edn (Cambridge: Cambridge University Press, 2014), 13–146; Hugh Thirlway, 'Human Rights in Customary Law: An Attempt to Define Some of the Issues', *Leiden Journal of International Law* 28 (2015): 495–506.

⁸ Vienna Convention on the Law of Treaties (VCLT) (Vienna, 23 May 1969, 1155 UNTS 331).

law,⁹ and, accordingly, that of the generality of general international law in respect of sources.

Of course, the notion of ‘generality’ of international law is itself fraught with difficulty,¹⁰ and this makes the question of the specificity of the sources of IHRL even more complex. It may be understood in three distinct and potentially, albeit not necessarily and actually rarely, overlapping ways: (i) mostly with respect to the subject matter of international law (*lex generalis*) (*general topic*); (ii) sometimes with respect to its personal scope (first, binding all States or even, although this is not necessarily the case, all subjects of international law [obligations *omnium*] and, second, albeit not necessarily so, owed to all States or even to all subjects of international law [obligations *erga omnes*]) (*general scope*); (iii) and, by extension, with respect to ‘secondary rules’ of international law (rules of recognition, change, and adjudication), and especially to those regulating the sources of international law themselves (so-called ‘general rules of international law’) (*general rules*).¹¹ What is complicated in international law is that not all sources of international law necessarily give rise to norms that bind all States, or even all subjects of international law. This explains why ‘general international law’, understood by reference to its second meaning, is also used, in a further extension (iv), to refer to sources of international law, like customary international law and general principles, that give rise to norms that bind generally. In short, the sources of general international law in the second meaning of the term are equated with those general sources of international law (*general sources*).¹² This unreflected identification explains why so many discussions of the sources of international law often derail, and the debate about the sources of IHRL is an example to point. Unless indicated differently, I will refer to general international law in this chapter in its third meaning, i.e. *qua* general rules of international law including general rules on sources.

The sources of IHRL were in fact at the heart of intense debates since its emergence post-war, and well into the 1980s following the publication of Philip Alston

⁹ See e.g., De Schutter, ‘The Emergence’, p. 1. Regimes are regarded as autonomous or ‘self-contained’ when they differ substantially from general international law, be it from the perspective of (i) their sources; or (ii) their principles of responsibility. When they are autonomous in the literal sense of determining their own sources, the question then, of course, is whether they should not be considered as separate systems of law outside the international legal system (for the latter to be a system indeed, all its regimes should share the same sources; see also Thirlway, *The Sources*, pp. 173–5). Hence the common view that there cannot be and are no self-contained regimes in international law (see ILC, ‘Conclusions of the Study Group on the Fragmentation of International Law’, *YILC* (2006) Vol. II, Part 2, 177, 179, para. 9).

¹⁰ See Rüdiger Wolfrum, ‘General International Law (Principles, Rules, and Standards)’, in Rüdiger Wolfrum, ed., *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2010), <<http://opil.ouplaw.com/home/EPIL>>, accessed 5 June 2017.

¹¹ See *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, 90, para. 37.

¹² Contra: Grigory Tunkin, ‘Is General International Law Customary Law Only?’, *European Journal of International Law* 4 (1993): 534–41.

and Bruno Simma's seminal article.¹³ Curiously, they no longer seem to be a central concern in international human rights scholarship. This is true for human rights lawyers,¹⁴ as much as for human rights theorists.¹⁵

First of all, most human rights lawyers to date take the differences between the sources of IHRL and those of general international law for granted, and rarely explain or even account for them in detail.¹⁶ Conversely, few general international lawyers draw, at least expressly, on IHRL to flesh out or even question what could be described as 'general international sources law'¹⁷—unlike what is the case for other general rules of international law, such as the ones pertaining to international responsibility, for instance, where IHRL is a common example.¹⁸ Secondly, the relationships between human rights lawyers and general international lawyers are often dominated by mutual disdain.¹⁹ This is well captured by the French pejorative denomination '*droits de l'homme*' (literally, 'human-rightsism'), first coined by Alain Pellet and referring to some human rights lawyers' unwarranted claim to particularism, and even to rectitude.²⁰ Worse, while human rights lawyers are often pigeon-holed by other international lawyers as 'natural lawyers', general

¹³ See e.g., Hersch Lauterpacht, *International Law and Human Rights* (New York: Frederick Praeger Inc., 1950); Egon Schwelb, 'The International Court of Justice and the Human Rights Clauses of the Charter', *American Journal of International Law* 66 (1972): 337–51; Karel Vasak, 'Vers un droit international spécifique des droits de l'homme', in Karel Vasak, ed., *Les dimensions internationales des droits de l'homme* (Paris: UNESCO, 1978), 707–15; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1991); Simma and Alston, 'The Sources'; Higgins, 'Human Rights'; Bruno Simma, *From Bilateralism to Community Interests in International Law*, vol. 367, *Collected Courses of the Hague Academy of International Law* (Leiden: Brill/Nijhoff, 1994), 217–384; Bruno Simma, 'International Human Rights and General International Law: A Comparative Analysis', *Collected Courses of the Academy of European Law* 5 (1995): 153–236; Jean-François Flauss, 'La protection des droits de l'homme et les sources du droit international', in Société française pour le droit international, ed., *La protection des droits de l'homme et l'évolution du droit international* (Paris: Pedone, 1998), 11–79; Craven, 'Legal Differentiation'.

¹⁴ Exceptions are e.g., Chinkin, 'Sources'; De Schutter, 'The Emergence'; Thirlway, *The Sources*. See also Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006), and the essays in Menno T. Kamminga and Martin Scheinin, eds, *The Impact of Human Rights Law on General International Law* (Oxford: Oxford University Press, 2009).

¹⁵ Exceptions are e.g. John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', *Oxford Journal of Legal Studies* 16 (1996): 85–128; George Letsas, 'Strasbourg's Interpretative Ethic: Lessons for the International Lawyer', *European Journal of International Law* 21 (2010): 509–41.

¹⁶ See also Alain Pellet, '"Droits-de-l'homme" et droit international', *Revue Droits fondamentaux* 1 (2001): 167–79, 170.

¹⁷ For exceptions, see the essays in Kamminga and Scheinin, eds, *The Impact of Human Rights Law on General International Law*; Menno T. Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law', in Kamminga and Scheinin, eds, *The Impact of Human Rights Law on General International Law*, 1–22.

¹⁸ See also Simma and Alston, 'The Sources', p. 88. Contra: Pellet, 'Droits-de-l'homme', p. 172.

¹⁹ See on this 'scholastic quarrel', Flauss, 'La Protection des droits de l'homme', pp. 13–14.

²⁰ See on this 'abusive search for particularism', Pellet, 'Droits-de-l'homme', p. 168.

international lawyers are in return often boxed as ‘positivist lawyers’ by human rights lawyers.²¹

This chapter aims to revive the discussion of the sources of IHRL in general international law scholarship. There are—and this will be the argument—at least three features of ILHR that account for their specificities in terms of sources and are reflected thereby: their dual moral and legal nature as rights, and the corresponding objectivity that characterize some of their sources (section II: The Moral and Legal Nature of Human Rights and the Objectivity of International Human Rights Law); their dual domestic and international legality as legal rights, and the corresponding transnationality of some of their sources (section III: The Dual Legality of Human Rights and the Transnationality of International Human Rights Law); and their universality as moral and legal rights, and the corresponding generality of some of their sources (section IV: The Universality of Human Rights and the Generality of International Human Rights Law). Finally, and by way of a conclusion, I will revert to the general question of the distinctiveness of the sources of IHRL, take stock in a nuanced fashion, and draw some implications for the sources of international law in general (section V: Conclusion).

Given the diversity of theoretical approaches to sources used in this book, a methodological caveat is in order. Unlike IHRL textbook accounts,²² the chapter does not claim to discuss all sources of IHRL in an exhaustive and systematic fashion. Instead, it approaches the question from the perspective of human rights theory and, more precisely, from the perspective of a legal theory of human rights. It starts from the existing practice of IHRL and aims to provide the best interpretation and justification thereof, i.e. one that puts the practice in its best light.²³ First, to that extent, the chapter does not aim to propose an independent moral theory of the legal sources of human rights that could then be used to reform the existing practice of IHRL. It is not about imposing a moral blueprint onto that practice by identifying what human rights are and then by drawing implications for what the sources of IHRL should be.²⁴ Nor, however, is the chapter, secondly, about reconstructing the practice as a theory and into its own justification. The danger with such a method would be to read too much into the practice of IHRL, and the result would be both apologetic and reductive. Of course, to the extent that the practice of (the sources of) international law is structured in part by our doctrinal

²¹ See e.g., Chinkin, ‘Sources’, p. 77. Contra: Simma and Alston, ‘The Sources’, pp. 107–8.

²² See e.g., Thirlway, *The Sources*, pp. 175–84; De Schutter, ‘The Emergence’, pp. 14–35; Chinkin, ‘Sources’.

²³ See Samantha Besson, ‘The Law in Human Rights Theory’, *Zeitschrift für Menschenrechte—Journal for Human Rights* 7 (2013): 120–50.

²⁴ See e.g., De Schutter, ‘The Emergence’, whose account of the sources of IHRL is guided by normative assumptions about human rights (e.g. their binding all subjects including non-State actors: p. 14; the objectivity of their corresponding obligations: p. 118). See also Simma and Alston, ‘The Sources’, pp. 82–3. For the same critique, see Pellet, ‘Droits-de-l’hommeisme’, p. 170.

categories, there may be an inescapable degree of (virtuous) circularity between how scholars interpret and account for the practice, on the one hand, and the practice itself, on the other.

Finally, a few remarks about the scope of the chapter are in order. First of all, I am leaving aside the question of the subjects of IHRL, and how the question of their sources relates to the identity of their right-holders and duty-bearers,²⁵ but also the implications this has for the more general relationship between the sources and the subjects of international law,²⁶ as this is discussed elsewhere in this volume.²⁷ Secondly, I am also eluding, the issue of the stringency of IHRL and especially of *jus cogens* norms and their specific prevalence in IHRL for those issues are not strictly issues of sources of IHRL. Of course, interesting questions arise with respect to imperative human rights norms' sources,²⁸ and about whether they themselves constitute sources of international law, for instance, *qua* international constitutional law, and hence bring about a kind of formal or material hierarchy of norms in international law,²⁹ but, again, these issues are discussed elsewhere in the book.³⁰ Thirdly, and it is related, the chapter does not address the question of the fragmentation of IHRL as it is understood to result from the lack of (formal) hierarchy between its sources and hence of systematicity in international law,³¹ but also, more specifically regarding one of its sources, from the plurality of (general or special; universal or

²⁵ See, however, section IV.2 regarding their personal scope.

²⁶ Contrary to what is sometimes argued by international (human rights) lawyers (e.g. Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006); Susan Marks, 'State-Centrism, International Law, and the Anxieties of Influence', *Leiden Journal of International Law* 19 (2006): 339–47), international subjectivity *qua* capacity to hold rights and bear duties under international law is not the issue at stake when we discuss the sources of international law, and especially of IHRL. An entity's capacity to bear obligations does not imply the existence of those duties for that entity in the first place: it is a necessary (based on the 'ought implies can' dictum), but not a sufficient condition for those duties to arise (a 'can' does not imply an 'ought'). Other conditions relate to the substance of the norms at stake, but also to the kind of legal personality at hand and especially whether it is functionally limited or not (see Jan Klabbbers, 'The EJIL Foreword: The Transformation of International Organizations Law', *European Journal of International Law* 26 (2015): 9–82, 71). Yet another set of conditions pertains to the source itself and the actual law-making process: customary law is not made like treaties and so on, and this in turn affects its ability to bind any international legal subject. In any case, not all legal subjects necessarily bear the same obligations, whether the latter share the same source or not.

²⁷ See chapter 35 by Robert McCorquodale, chapter 36 by Bruno de Witte, and chapter 45 by Jan Klabbbers in this volume.

²⁸ See Thirlway, *The Sources*, pp. 154–63; Sévrine Knuchel, *Jus Cogens: Identification and Enforcement of Peremptory Norms* (Zürich: Schulthess, 2015).

²⁹ See Ian Seiderman, *Hierarchy in International Law—The Human Rights Dimension* (Antwerp: Intersentia, 2001); Stephen Gardbaum, 'Human Rights as International Constitutional Rights', *European Journal of International Law* 19 (2008): 749–68; De Schutter, 'The Emergence', pp. 71–113.

³⁰ See chapter 29 by Erika de Wet and chapter 30 by Mario Prost in this volume.

³¹ See Liam Murphy, *What Makes Law—An Introduction to the Philosophy of Law* (Cambridge: Cambridge University Press, 2014), pp. 152–7.

regional) human rights treaties and the lack of hierarchy between them.³² The question is indeed not fundamentally different from the one that arises from fragmentation in the rest of international law,³³ and it is addressed elsewhere in the book.³⁴

II. THE MORAL AND LEGAL NATURE OF HUMAN RIGHTS AND THE OBJECTIVITY OF INTERNATIONAL HUMAN RIGHTS LAW

The first feature of human rights to be reflected in the sources of IHRL is their dual quality of moral and legal rights (section II.1). It accounts for the objectivity of IHRL (section II.2).

1. International Human Rights as Moral and Legal Rights

ILHR should be regarded as ‘rights’ and as being at once ‘moral and legal rights’.³⁵ First, the practice of IHRL treats human rights as rights. Of course, sometimes human rights go by other names, such as principles. In most cases, however, legal human rights’ reasoning is expressly rights-based reasoning, with references to interests, duties, etc.

Secondly, *qua* rights, human rights are best approached as at once moral and legal. *Qua* rights guaranteed by legal norms, ILHR are clearly legal rights. Just as moral rights are moral propositions and sources of moral duties, legal rights are legal propositions and sources of legal duties. More specifically, however, they are moral interests recognized by law as sufficiently important to generate moral duties.³⁶ The same may be said of legal human rights: legal human rights are fundamental and

³² See Eva Brems, ‘Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration’, *European Journal of Human Rights* 4 (2014): 447–70.

³³ See ILC, ‘Conclusions of the Study Group on the Fragmentation of International Law’.

³⁴ See chapter 28 by Gleider I. Hernández and chapter 27 by Michael Giudice in this volume.

³⁵ See Samantha Besson, ‘Human Rights and Constitutional Law: Mutual Validation and Legitimation’, in Rowan Cruft, S. Matthew Liao, and Massimo Renzo, eds, *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015), 279–99, 281–5; Samantha Besson, ‘Legal Human Rights Theory’, in Kimberley Brownlee, Kasper Lippert-Ramussen, and David Coady, eds, *Blackwell Companion to Applied Philosophy* (London: Blackwell Wiley, 2016), 328–41.

³⁶ See e.g., Joseph Raz, ‘Legal Rights’, *Oxford Journal of Legal Studies* 4 (1984): 1–21, 12.

general moral interests recognized by the law as sufficiently important to generate moral duties. The question is whether human rights *qua* legal rights are also moral rights. Generally, all legal rights are also moral rights. Legal rights recognize, modify, or even create moral rights by recognizing moral interests as sufficiently important to generate moral duties. As such, legal rights are always also moral rights, whether by recognition and specification of pre-existing moral rights, or by creation of moral rights. The reverse is not true, however: all moral rights are not necessarily also legal rights. Some moral rights can exist independently from legal rights. In fact, there may be ways of protecting moral interests or even independent moral rights legally without recognizing them as legal rights.

Like other legal rights, therefore, human rights are also moral *qua* rights. But unlike other moral rights, they should also be legal at the same time. This is, first, because the universal moral rights that will become human rights create moral duties primarily for institutions, and hence for the law as well, to recognize and protect human rights.³⁷ Secondly, and more fundamentally, the legalization of human rights is the only way to give them their central egalitarian and hence democratic dimension. This is necessary to assess, for instance, whether the interests protected and the threats weighing on them are standard and general socio-comparatively, on the one hand, and to assess the equality of the burden of the corresponding duties, on the other.³⁸ The law turns universal moral rights into human rights, either by merely recognizing them as legal rights or by specifying them in recognizing certain fundamental universal moral interests as socio-comparatively important. In the latter case, the law is an integral part of the institutional and relational nature of human rights. As a result, human rights *qua* subset of universal moral rights are of an inherently legal nature.

In short, while legal rights *stricto sensu* are moral in nature (*qua* rights), human rights (*qua* rights) are also legal and they amount to both moral and legal rights. This understanding of the relationship between moral and legal human rights is in fact one of mutuality. It goes beyond the traditional understanding of a unilateral relationship of translation, transposition, or enforcement of moral human rights into legal human rights.³⁹

Importantly, there is nothing in the relationship between moral and legal human rights, and in the moral nature of ILHR, that makes IHRL necessarily less 'positive' than other international law norms. The opposition between natural law and

³⁷ See Joseph Raz, 'Human Rights in the Emerging World Order', *Transnational Legal Theory* 1 (2010): 31–47; Joseph Raz, 'Human Rights without Foundations', in Besson and Tasioulas, eds, *The Philosophy of International Law*, 321–37.

³⁸ See Samantha Besson, 'The Egalitarian Dimension of Human Rights', *Archiv für Sozial- und Rechtsphilosophie Beiheft* (2012): 19–52.

³⁹ This is a reason not to use the terms 'positivization' or 'suprapositivity' (Gerald L. Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance', *Stanford Law Review* 55 (2003): 1863–900) to refer to the relationship between ILHR and moral rights.

positive law, or, more exactly, between *jusnaturalism* and legal positivism, is one between theories of the validity of law and, particularly, of the latter's dependence on morality or not. Legal positivism, as it is used in this chapter, is the view that the grounds of law are a matter of fact, and not of morality. Considering that a legal norm corresponds to a moral norm or, more indirectly, to some moral value does not necessarily make one a natural lawyer. Provided the validity of ILHR as legal rights does not depend on their moral content, but on social facts, IHRL remains posited law.

True, IHRL is very clear about its moral ties. It refers expressly to the existence of moral justifications for human rights. It does so mostly in preambles to human rights treaties (e.g. by reference to dignity, equality, or autonomy). This is not surprising for a legal positivist, however, even though it is more explicit than in other areas of international law. After all, legal reasoning about human rights, like legal reasoning in general, is (moral) reasoning of a special kind. What the law does is to develop, specify, or exclude morality, but not incorporate it: it is part of it.⁴⁰ And the same may be said about legal human rights and how they specify or even develop universal moral rights. General principles are an case in point: they specify moral principles or moral values in an institutional and procedural context and, by doing so, turn them into legal principles. Even in the cases in which legal principles are regarded as mere reflections of moral principles without specification (which is rare), they do not turn morality into law, but simply give legal effects to morality within a given legal order.

Importantly, the claim about the absence of conceptual connection between international law and morality does not equate with the more radical claim about a lack of factual connection between them. On the contrary, there is clearly a continuity and factual relationship between law and morality. The difficulty in understanding this distinction is greater in international law because of the false association between legal positivism and consensualism or voluntarism, i.e. the view that the validity of international law flows from State consent. This association is held to imply not only a stark separation between law and morality, but also the absence of factual relationship between them. From that perspective, general principles in international law, whose identification is not consent-based, are often regarded as a form of natural law and evidence of the inclusion of morality within the international legal order.⁴¹ It is important, however, to dispel the idea that legal positivism should be associated with State consent,⁴² and the corresponding view that only those sources of international law that rely somehow on State consent are allegedly

⁴⁰ See Joseph Raz, 'Reasoning with Rules,' *Current Legal Problems* 54 (2001): 1–18.

⁴¹ See e.g., *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, Separate Opinion of Judge Cançado Trindade, paras 47 and 200.

⁴² See the discussion in Besson, 'Theorizing the Sources,' pp. 165–6; Murphy, *What Makes Law*, pp. 179–82.

able to posit international law.⁴³ The ties between legal positivism and consensualism are historical, but are not warranted conceptually: State consent may matter in the processes of international law-making, but it is not the ground of law stemming from these sources and of its validity, i.e. of the legal nature of the duties arising from a treaty. By extension, in IHRL, it is not because some of the sources of IHRL are independent from State consent that IHRL is to be equated with natural law.⁴⁴ Nor should a legal positivist account of IHRL of the kind proposed in this chapter necessarily be regarded as consensualist.⁴⁵

2. International Human Rights Law as Objective Law

The moral nature of ILHR accounts for some of the specific features of the sources of IHRL, and particularly for what one may refer to as their 'objectivity'.

Unlike domestic law, international law also includes norms whose normativity may be regarded as subjective or consent-based.⁴⁶ This is because some of its norms are more akin to what one would regard, in domestic law, as mere promises or contracts. While some of the sources of international law accommodate both kinds of normativity, such as treaties, others do not, such as customary international law and general principles.

The objectivity of IHRL may clearly be illustrated by two characteristics of its sources among others (like the importance of soft law): (a) the legislative dimensions of human rights treaties (and hence of international treaty law applicable to them); and (b) the importance of general principles in human rights' reasoning (and hence of judicial reasoning in IHRL, more generally).

A. *The Legislative Dimensions of Human Rights Treaties*

Human rights are protected by many multilateral treaties, some universal (or potentially so) and some regional. Those treaties are concluded as such and should, as a result, comply with the international law on treaties, particularly the VCLT.

Interestingly, human rights treaties' practice demonstrates legislation-like features.⁴⁷ These features are reminiscent of those associated with so-called 'legislative'

⁴³ Of course, (democratic) State consent plays an important role in the context of the justification of the authority of international law, and especially as a potential democratic exception to its otherwise legitimate authority. See Samantha Besson, 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox', *Leiden Journal of International Law* 29 (2016): 289–316, 305–12.

⁴⁴ Contra: Chinkin, 'Sources', pp. 77, 98.

⁴⁵ Contra: Simma and Alston, 'The Sources', p. 105.

⁴⁶ See also Besson, 'Theorizing the Sources', p. 171.

⁴⁷ See Higgins, 'Human Rights', p. 11; Simma, 'International Human Rights', pp. 181–2; Lea Brilmayer, 'From "Contract" to "Pledge": The Structure of International Human Rights Agreements', *British Yearbook of International Law* 77 (2007): 163–202.

treaties as opposed to 'contract-like' treaties.⁴⁸ In short, what 'legislative' treaties have in common is that they have gradually grown out of their parties' constitutive mutual consent, and of the structure of reciprocity induced by the exchange of agreement between parties, and hence out of the structure of reciprocal duties.⁴⁹ These legislative and non-reciprocal characteristics of human rights' treaties clearly reflect their moral content and objective nature.⁵⁰

Structurally, human rights treaties grant rights to individuals who are not parties to the treaties. They give rise to interstate duties as well, but only as second-order duties to abide by the first-order duties of each State owed to individuals under its jurisdiction. To that extent, those treaties do not give rise to reciprocal duties between States parties, for the latter owe their second-order duties to all other States parties and not to each of them reciprocally. The individual rights protected by human rights treaties are not mutually owed and hence the object of an exchange between States parties, unlike what occurs in other treaties that grant direct individual rights (e.g. treaties on consular or diplomatic relations or on immunities).

Three legislative features of human rights treaties will be discussed in this section: (i) the limited validity and severability of reservations; (ii) the continuity of human rights treaties despite breach, denunciation, or succession; and (iii) the *erga omnes* effects of human rights treaties. While some of those features are allowed under the VCLT that is generally open to intentional derogations by States parties, or to derogations based on the 'object and purpose of the treaty',⁵¹ others have developed despite contrary rules in the VCLT.

1. *The validity and severability of reservations to human rights treaties*

According to Articles 19 ff. of the VCLT, States parties may file reservations regarding the applicability of treaty provisions to them provided they respect certain conditions, leading to certain consequences.

⁴⁸ Once the role of State consent in international law-making is accounted for separately from reciprocity (see section II.1), it is easier to acknowledge that the reciprocity of duties is not a necessary feature of treaties. Human rights treaties have not been the only legislative treaties arising after 1969 and VCLT rules can accommodate both contractual and legislative features of treaties. See also Craven, 'Legal Differentiation', p. 504; Kenneth Keith, 'Bilateralism and Community in Treaty Law and Practice—of Warriors, Workers, and (Hook-)Worms', in Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer, and Christoph Vedder, eds, *From Bilateralism to Community Interest—Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011), 754–67, 761–5, 767.

⁴⁹ Contra Simma, *From Bilateralism*, pp. 369, 401. I do not consider the correlativity of (individual) rights and (State or institutional) duties in human rights treaties as implying any form of reciprocity in the actual legal source of those rights and duties. If domestic fundamental rights may stem from constitutions or legislation, and not from private contracts, this can be true of international human rights too.

⁵⁰ On 'objective obligations', see ECtHR, *Mamatkulov and Askarov v Turkey* (appl. no. 46827/99 and 46951/99), Judgment (Grand Chamber), 4 February 2005, Reports 2005-I, para. 100.

⁵¹ See Craven, 'Legal Differentiation', pp. 494–7.

In the VCLT system, States parties may individually assess the validity of reservations made to their treaties and object to them. In the case of human rights treaties, however, international human rights monitoring bodies, be they judicial or non-judicial, have centralized that power (e.g. Article 57 of the European Convention on Human Rights (ECHR)).⁵² The centralized authority of international human rights bodies or courts in the matter may be justified by reference to the objective and hence collective nature of the interests at stake and, accordingly, by the absence of reciprocal rights and duties of States parties.⁵³ This centralization of authority is not in itself incompatible with the VCLT, however, for the latter does not explicitly exclude a delegation of powers to an international body.

In other respects, however, the practice pertaining to the reservations to human rights treaties has built into a divergent practice with respect to both their validity and their severability, and has stirred an interesting controversy.⁵⁴

First, let us look at the validity of reservations to human rights treaties. Under the conditions of Article 19 of the VCLT, reservations are deemed invalid in case they are prohibited by the treaty itself or are not compatible with the object and the purpose of the treaty. If they are valid in this regard, they affect the scope of the treaty rights and duties provided the other States parties consent to them or, at least, do not object to them (Article 20 of the VCLT). By contrast, the validity of reservations to human rights treaties has been assessed even outside of those two possibilities by international human rights' bodies and courts and independently from the parties' consent. This has been confirmed by the practice of United Nations (UN) human rights treaty bodies, such as the Human Rights Committee (HRC) in particular,⁵⁵ and of the European Court of Human Rights (ECtHR).⁵⁶ Those institutions have expressed doubts as to the compatibility of reservations with the object and the purpose of human rights treaties in general, and despite the fact that those treaties do not exclude reservations and, in some cases, actually grant the possibility of filing some (e.g. Article 57 of the ECHR).

The first argument for the limited validity of reservations to human rights treaties is that human rights treaties often give rise to imperative or, at least, particularly stringent duties. This argument cannot be accepted outside of reservations to non-derogable or absolute rights, however, for most human rights may be restricted

⁵² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) (Rome, 4 November 1950, ETS No. 005).

⁵³ See also Higgins, 'Human Rights', p. 12; Craven, 'Legal Differentiation', p. 496.

⁵⁴ See e.g., Craven, 'Legal Differentiation', pp. 495–7; Higgins, 'Human Rights'.

⁵⁵ See HRC, General Comment No. 24, *Issues relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant*, 11 November 1994, CCPR/C/21/Rev.1/Add.6, para. 17. See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

⁵⁶ See ECtHR, *Belilos v Switzerland* (appl. no. 10328/83), Judgment (Plenary), 29 April 1988, Series A No. 132, paras 55–60.

provided justifications are given. As a matter of fact, with respect to non-derogable rights, Article 19 of the VCLT, read in conjunction with Article 53 of the VCLT, already includes the violation of *jus cogens* as an implicit ground for the invalidity of reservations. If that is correct, there would be nothing unusual about claiming the invalidity of reservations to imperative human rights duties. Of course, one may argue that the scope of *jus cogens* norms under Article 53 of the VCLT is narrower than that of absolute human rights, on the one hand, or of absolute core duties to all human rights, on the other.

A second argument may be that restrictions to human rights, although they may be justified, are concrete, and not abstract or blanket restrictions of the kind allowed by reservations.⁵⁷ One may argue further that the justificatory requirements stemming from human rights treaties' restriction clauses, or implicit to them in practice, in fact require a concrete balancing and that this balancing cannot be abstractly pre-empted through *ex ante* reservations. Finally, that concrete balancing to be justified must be sufficiently egalitarian and hence democratic. This would explain why, among the conditions for reservations to human rights treaties (e.g. under Article 57 of the ECHR), one usually finds a requirement for justification in the light of domestic law and presumably under some form of democratic control. This also accounts, moreover, for why international human rights bodies and courts understand reservations as limited in time, and see themselves as entitled to regularly press States parties to withdraw their reservations even when they have been considered as valid.

A third argument for the limited validity of reservations to human rights treaties is that some human rights may also stem from sources of international law that are not consent-based like general principles or customary international law. As a result, consent to a reservation cannot justify restrictions to a general human rights principle or custom that does not allow for reservations. This argument only pertains to these sources of ILHR, of course. However, since a multi-sourced norm remains the same norm, the concurrent customary nature of a given human rights duty certainly nuances the consent requirement for reservations in the law of treaties.

Secondly, let us examine the severability of reservations to human rights treaties. Under Articles 20–21 of the VCLT, each State party may object to reservations to human rights treaties. The objecting State even has the choice to oppose the entry into force of the treaty between itself and the reserving State (Article 20 (4) (b) of the VCLT). If it does not, the reserved provision will apply between the two States as foreseen by the reservation (Article 21 (3) of the VCLT). By contrast, international human rights courts and bodies have decided that a reservation to a human rights treaty deemed invalid could be severed from the treaty without the latter's validity

⁵⁷ See also Higgins, 'Human Rights', p. 15.

being contestable by either of the parties, including the reserving State, and with all its provisions including the one concerned by the reservation.⁵⁸

The argument given for this other derogation to the consent requirement under VCLT rules is that, unlike other treaties, human rights treaties do not give rise to reciprocal duties. This feature allegedly undermines the whole purpose of the mutual acceptance of reservations; that is, to 'bilateralize' duties in multilateral treaties.⁵⁹ The debate is still open, however. Some States, although by far not all States parties to date, have resisted the severability practice. However, the HRC has maintained it to this date.⁶⁰ Interestingly, the International Law Commission (ILC) draws a distinction between international human rights courts and other international human rights bodies. It considers the former as entitled to decide as they have so far because they have been empowered by States to decide authoritatively on such issues unlike treaty bodies. As a result, the ILC recommends that, outside international courts' jurisdiction, the decision about severability be left to States.⁶¹

II. *The continuity of human rights treaties*

The so-called 'humanitarian exception' of Article 60 (5) of the VCLT expressly excludes the termination/suspension of human rights treaties for breach of treaty by one of the parties. This is usually understood as being due to their non-reciprocal or legislative nature.

There are two further features of the practice of human rights treaties that confirm their continuity and exemplify their legislative nature.⁶² The first one is the automatic succession to human rights treaties,⁶³ while the second one is their non-denunciability.⁶⁴

Both features are controversial, of course, for not only are they not explicitly foreseen by the VCLT, but they contradict the little international succession law there is and explicit denunciation clauses existing in some, albeit not all human rights treaties (e.g. Article 58 of the ECHR). In response, one should say, first, that international succession law is ridden with controversy and there is hardly any coherent practice to refer to. As to explicit denunciation clauses, they have only rarely been acted upon by States parties. While this may be for other strategic or legal

⁵⁸ See HRC, General Comment No. 24, para. 18; ECtHR, *Belilos*.

⁵⁹ See also Higgins, 'Human Rights', p. 11.

⁶⁰ See HRC, *Kennedy v Trinidad and Tobago*, comm. no. 845/1999, CCPR/C/74/D/845/1998 (2 November 1999).

⁶¹ See ILC, 'Guide to the Practice on Reservations to Treaties', in Report on the Work of the Sixty-Third Session (26 April–3 June and 4 July–12 August 2011), UN Doc. A/66/10/Add.1, paras 3.2.2 ff.

⁶² See Higgins, 'Human Rights', p. 11. See also ICJ, *Genocide*, Separate Opinion of Judge Weeramantry, para. 549.

⁶³ See UN Commission on Human Rights, Resolution 1993/23, *Succession of States in Respect of International Human Rights Treaties*, 5 March 1993, E/CN.4/1993/122; HRC, General Comment No. 26, *Continuity of Obligations*, 8 December 1997, CCPR/C/21/Rev.1/Add.8/Rev.1.

⁶⁴ See HRC, General Comment No. 26.

reasons, such as the concurrence of customary human rights law that may not be denounced, the limited application of these clauses in practice is telling.

III. *The erga omnes effects of human rights treaties*

Under the VCLT, treaties have no third-party effects, at least not to the extent that they give rise to rights or duties for States that are not States parties (*pacta tertiis nec nocent nec prosunt*; Articles 34–7 of the VCLT). This section focuses on the claim side, i.e. on the *rights* of other States than the States parties, while the supply side, and their *duties*, will be addressed in the third section.

As mentioned before, human rights treaties grant rights to individuals situated under the jurisdiction of the States parties who owe them those human rights' duties. As a result, the first-order right-holders of rights arising under human rights treaties are not parties to those treaties. To the extent that human rights treaties give rights to States parties, it is *qua* second-order rights, and not *qua* first-order rights to the content of those human rights directly. Other States parties hold rights together that people under the jurisdiction of a given State party have their human rights recognized and protected, on the one hand, and the latter States party owes duties towards all other States parties to owe human rights duties towards first-order individual right-holders under their respective jurisdiction, on the other. Importantly, those second-order rights and duties of other States parties do not have the same content as the human rights and duties they pertain to: they are duties of prevention and assistance. Nor are they reciprocal rights and duties between States: States do not owe each other the human rights duties they owe to the individuals under their respective jurisdiction, on the one hand, and what they owe is to all other States parties and not to each of them individually, on the other.⁶⁵

These second-order rights of States parties to human rights treaties are commonly described as the *erga omnes* character of human rights duties. Interestingly, the term may be used for duties owed to other States parties (*erga omnes partes*), as much as to any other State outside the scope of States parties (*erga omnes tout court*).

Evidence for the *erga omnes partes* duties of States parties to human rights treaties is, first of all, that any State party can be held responsible by other States parties through interstate complaint mechanisms, whether before international human rights treaty bodies (e.g. Article 41 of the International Covenant on Civil and Political Rights (ICCPR)) or before international human rights courts (e.g. Article 33 of the ECHR).⁶⁶ Of course, those mechanisms are often optional and even when they are not, they are rarely used. The reason for this lack of effectiveness lies precisely in their *prima facie* contractualist flavour of reciprocity and the consequences of that reciprocity were they to be used. However, this is a mistake. Those

⁶⁵ See e.g., Besson, 'Human Rights and Constitutional Law', pp. 287–8.

⁶⁶ International Covenant on Civil and Political Rights (ICCPR) (New York, 16 December 1966, 999 UNTS 171).

mechanisms should rather be understood to reflect the legislative nature of IHRL whereby every other State shares an objective interest in holding others accountable for the violation of their human rights duties to their respective individual human rights-holders. Evidence for this may be found in the admissibility conditions: States do not have to be victims of a violation of their own rights, and the mere violation of human rights of individuals under the jurisdiction of another State is enough to trigger the right to file an interstate application.

More generally, secondly, the IHRL duties' *erga omnes* effect *tout court* explains that other States than States parties to a human rights treaty, alone or together, may invoke the human rights responsibility of a State in case of violation of its human rights duties (Article 48 (1) of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA); by contrast to Article 42 (b) ARSIWA).⁶⁷ Again, presumably for the reasons mentioned before, the international *locus standi* of other States than the duty-bearing State, and even than other States parties, has not yet been used to date to uphold human rights responsibility.

Some authors have contested the argument that all ILHR have an *erga omnes* character. Following the International Court of Justice (ICJ), they concede that this should be the case at least for imperative ILHR, and especially so because of the (now infamous) identification by the ICJ of their imperative and *erga omnes* features.⁶⁸ Other authors are ready to extend their *erga omnes* character to some non-imperative human rights as well, but not to all of them.⁶⁹

Two arguments may be made in favour of granting all ILHR *erga omnes* effect. First, there is a distinction between having a right and benefiting from procedural mechanisms or remedies to enforce it in practice. One should not therefore draw too much from the separation between a State's diplomatic resources available to protect its right to exercise diplomatic protection and that State's second-order right to the respect of the human rights of individuals not located under its jurisdiction. The right to diplomatic protection pertains only to one's State's nationals, and not to those of the other States, thus undermining the overlap between these procedures. Secondly, the lack of translation of the *erga omnes* character of human rights duties into automatic standing in international procedures, where standing is still optional, cannot be held as an argument against that character given the general separation between substantive norms and procedural remedies in the international legal order.⁷⁰

⁶⁷ ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Annex to UNGA Res. 56/83 (12 December 2001), corrected by A/56/49 (vol. 1).

⁶⁸ See e.g., *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3, 32–4.

⁶⁹ See e.g., De Schutter, 'The Emergence', pp. 114–16.

⁷⁰ See e.g., *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, 31–2, para. 64.

Importantly, I have been focusing so far on the *erga omnes* duties stemming from human rights treaties, and not from customary IHRL. Not only can the latter not be derived only from its customary nature (customary duties are *omnium*, but not necessarily *erga omnes*, depending on their content), but also, even if it applies to customary ILHR duties as well, this would not account for the *erga omnes* effects of human rights treaties themselves—despite the concurrence of both sources of the same norm (see also Article 38 of the VCLT).⁷¹

B. *The Importance of General Principles of Human Rights Law*

General principles of international law are traditionally divided into two groups: general principles of law and general principles of international law *stricto sensu*.⁷² General principles of law are principles that are fundamental to domestic legal orders and that may be extended to the international legal order. They stem from domestic law and are therefore principles held *in foro domestico*. General principles of international law, by contrast, are principles that are fundamental to the international legal order itself. They arise from various sources of international law, such as general treaties and customary international law.

The first group of principles is the one envisaged by Article 38 (1) (c) of the ICJ Statute as a source of international law. International legal practice, however, has quickly recognized the existence and significance of the second group of principles as well, albeit not necessarily as a source of international law, but merely as a type of norm of international law. Importantly, however, the case law does not clearly distinguish between the two types of general principles,⁷³ and hence between their sources.⁷⁴ One may even venture that the ICJ does so to escape the strict conditions of customary international law,⁷⁵ on the one hand, without, however, having to link them back to domestic principles, on the other.

General principles correspond to moral and hence to objective norms of international law, whether in content or in sources, i.e. norms that arise independently from consent. It should not come as a surprise therefore that, in practice, general principles play a big part among the sources of IHRL. Evidence for this may be found in some ICJ decisions, whether they are antecedent,⁷⁶ or

⁷¹ See e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, 94–5, para. 177.

⁷² See Samantha Besson, 'General Principles in International Law—Whose Principles?', in Samantha Besson and Pascal Pichonnaz, eds, *Principles in European and International Law* (Geneva: Schulthess, 2011), 19–64.

⁷³ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 200, para. 159.

⁷⁴ See e.g., *South-West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Judgment, Second Phase) [1966] ICJ Rep 6, 39.

⁷⁵ See e.g., ICJ, *Nicaragua*, pp. 113–14, 202.

⁷⁶ See e.g., *Corfu Channel case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 22; and ICJ, *Genocide*, pp. 19, 23.

posterior,⁷⁷ to the adoption and development of human rights treaties. Sometimes this reference to general principles has explicitly included a reference to the principles enunciated in the 1948 Universal Declaration of Human Rights (UDHR),⁷⁸ presumably through their pre-existence or later recognition in domestic bills of rights, thus confirming that UDHR rights are recognized as general principles of international law and have acquired legal validity through that source.⁷⁹

Here are two further arguments in favour of treating general principles as a source of IHRL.

First of all, many ILHR abide by the criteria for the identification of general principles as a source of international law, and in particular the generalizable nature of the principle that ought to have been recognized legally in most States in the world.⁸⁰ With respect to the first element, the ascertainment of domestic legal recognition of general principles does not need to be practice-based:⁸¹ it can hence rely on declarations (e.g. a bill of rights or a constitution), statements, or instruments of ratification (e.g. of human rights treaties).⁸² Thus, it is easy to observe that, even without being respected on a regular and coherent basis, most ILHR are at least recognized as general principles domestically. Of course, there are exceptions. In reply, one should stress that general principles need not be universally recognized to be sources of international law: some degree of generality is sufficient. Based on the IHRL practice, and particularly the representativeness requirements applicable at the Human Rights Council (HR Council), one may refer to the five regional groups from whom the members of the HRC are elected and whose regional practice is relevant.⁸³ Within each group, it is possible to ascertain a minimal degree of regional generality of domestic recognition of ILHR as principles.⁸⁴

Secondly, the largely (domestic and international) judicial nature of general principles of international law is particularly suitable for IHRL. Under Article 38 (1) (c) of the ICJ Statute, general principles must be recognized by domestic institutions, usually courts, and then ascertained as sufficiently general and transposable to the international level by another court, this time an international court. Since human

⁷⁷ See e.g., ICJ, *Barcelona Traction*, paras 33, 155, and 159; *Case Concerning East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, 102, para. 29.

⁷⁸ Universal Declaration of Human Rights (UDHR) UNGA Res. 217A (10 December 1948).

⁷⁹ See e.g., *Case concerning United States Diplomatic and Consular Staff in Tehran (United States v Iran)* (Judgment) [1980] ICJ Rep 3, 42.

⁸⁰ *Procès-verbaux of the Proceedings of the Advisory Committee of Jurists, June 16th–July 24th 1920, with Annexes* (The Hague: Van Langenhuyzen Brothers, 1920), p. 335.

⁸¹ See Simma and Alston, 'The Sources', pp. 102–8.

⁸² *ibid.*, pp. 105–6.

⁸³ See UNGA Res. 60/251 (3 April 2006) (Human Rights Council), para. 7.

⁸⁴ On the role of regions in the transnational consolidation of universal human rights law, see Samantha Besson, 'The Influence of the UN Covenants in States Parties across Regions—Some Lessons for the Role of Comparative Law and Regions in International Human Rights Law', in Daniel Moeckli and Helen Keller, eds, *The UN Human Rights Covenants at 50* (Oxford: Oxford University Press, 2017), in press.

rights reasoning may be considered a special form of moral reasoning, and since judicial reasoning of all forms of legal reasoning comes closest to moral reasoning,⁸⁵ the judicial dimension of general principles makes them a source particularly suited to the objectivity of IHRL. As we will see in section III: The Dual Legality of Human Rights and the Transnationality of International Human Rights Law, the complementarity between domestic and international human rights adjudication in practice also corresponds to the transnationality of IHRL.

III. THE DUAL LEGALITY OF HUMAN RIGHTS AND THE TRANSNATIONALITY OF INTERNATIONAL HUMAN RIGHTS LAW

A second feature of legal human rights is to be protected by both domestic and international law at once (section III.1) and this dual legality accounts for the transnational dimensions of the sources of IHRL (section III.2).

1. Human Rights as Dual Domestic and International Legal Rights

It is a consequence of human rights' dual moral and legal nature that their legalization should take place at both the domestic and international levels at the same time.⁸⁶

Prima facie, of course, international law offers the potential universal personal scope that matches that of universal moral rights, and would seem to be the privileged locus of legalization of human rights. Given the interdependence between human rights, political equality, and democracy,⁸⁷ however, the political process through which their legalization takes place ought to be egalitarian and public, and include all those whose rights are affected and whose equality is at stake. As a result, using international law as the main instrument for recognizing fundamental and

⁸⁵ See also Jeremy Waldron, 'Judges as Moral Reasoners', *International Journal of Constitutional Law* 7 (2009): 2–24.

⁸⁶ See Besson, 'Human Rights and Constitutional Law', pp. 285–9.

⁸⁷ See Allen Buchanan, 'The Egalitarianism of Human Rights', *Ethics* 120 (2010): 679–710; Besson, 'The Egalitarian Dimension'.

general human interests as sufficiently important to generate duties at the domestic level would not be sufficiently democratically legitimate. Of course, human rights law should also constrain those democratic communities in return and cannot merely be defined by domestic albeit democratic procedures without international minima.⁸⁸

Interestingly, the dual legality of human rights corresponds to the way in which IHRL developed: through the practice of democratic States, but in a way of consolidation of that transnational practice into a minimal international law standard that gradually constrained their practice in return. Historically, indeed, much of the content of international human rights treaties, and the UDHR foremost, was drawn from domestic bills of rights existing in 1945, and many of the latter were then revised post-1945 to be in line with the former. This virtuous circle has been perpetuated since then in the way in which domestic and international legal norms pertaining to human rights have been interpreted and developed together. This is what I have referred to elsewhere as the mutual validation and legitimization of domestic and international human rights law.⁸⁹

Importantly, therefore, understanding the dual legality of the sources of IHRL goes much further than gesturing at their historical origins in domestic law. The relationship between IHRL and domestic human rights law (DHRL) is neither one-way (top-down or bottom-up), but mutual, nor static, but dynamic. Despite sharing the same structure (albeit minimally), international human rights are not redundant with domestic human rights. Nor, however, are they merely about filling the latter's gaps. On the contrary, IHRL fulfils complementary substantive, personal, and procedural functions that make it interdependent with DHRL.⁹⁰

2. International Human Rights Law as Transnational Law

This duality or complementarity between DHRL and IHRL in fact accounts for a second specificity of the sources of IHRL: their transnationality.⁹¹

Some sources of IHRL show clear signs of transnationality. It is the case of general principles of international law that are drawn from domestic human rights principles as discussed in section II: The Moral and Legal Nature of Human Rights and

⁸⁸ See Besson, 'Human Rights and Constitutional Law', pp. 286–8.

⁸⁹ *ibid.*, pp. 288–9.

⁹⁰ *ibid.*, p. 288. See also Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Belknap Press of Harvard University Press, 2011), pp. 334–5.

⁹¹ See Samantha Besson, 'Human Rights as Transnational Constitutional Law', in Anthony F. Lang, Jr. and Antje Wiener, eds, *Handbook on Global Constitutionalism* (Cheltenham: Edward Elgar, 2017), in press.

the Objectivity of International Human Rights Law, but also, as I will explain in this section, of (a) the formation of customary IHRL on grounds of an intrastate practice minimally shared across States; and (b) the complementarity between domestic and international human rights adjudication.

Importantly, the transnationality of human rights law is also reflected in the ways in which all other ILHR, whatever their sources, are determined and enforced within the domestic legal order.⁹² This applies to the main source of IHRL particularly, i.e. human rights treaties. Unlike other international treaties, international human rights treaties claim, and are usually granted immediate validity and direct effect in domestic legal orders, whether the latter endorse monism or dualism. This occurs in many cases through the joint, and largely indiscriminate, application of international and constitutional human rights by domestic authorities, and particularly domestic courts. Moreover, for the same reasons, international human rights treaties' norms often benefit from a (quasi) constitutional rank, and hence from primacy over other domestic law. As a matter of fact, finally, there are close ties in practice between international human rights treaties and the other more clearly transnational sources of human rights law, particularly between them and adjudication or customary law. International human rights treaties need to be interpreted before they are applied and these judicial interpretations consolidate into the treaties' *corpus conventionis*. On the one hand, those interpretations usually arise from complementary interpretations by domestic and international courts and confirm thereby the transnationality of IHRL. On the other hand, those judicial interpretations are often deemed as dynamic to the extent that they develop with the subsequent practice and agreement of States (Article 31 (3) (b) of the VCLT), thereby confirming human rights treaties' intimate connection to customary IHRL and, consequently, their transnational features.

A. *Common Intrastate Practice as Customary Human Rights Law*

The mutual validation between DHRL and IHRL accounts for the transnational features of customary IHRL, and particularly for the specific role, in its formation, of States' human rights practice *qua* intrastate practice minimally shared across States. Customary IHRL is indeed best approached as a bottom-up process of international law-making based on domestic human rights practice and constraining that practice in return.

Customary international law is usually said to be created and/or ascertained by reference to two elements: a general, regular, and coherent practice of States (*consuetudo*) and their conviction that that practice is binding as law (*opinio juris*).

⁹² See Neuman, 'Human Rights and Constitutional Rights', pp. 1890–5.

With the multiplication of States' practice and the difficult issues of evidence that follow, on the one hand, and the consolidation of international organizations and other interstate fora for the communication of States' convictions on the other, the two-element approach to customary international law or, at least, their respective weight have been questioned. Gradually, 'wilder', 'modern', or softer understandings of custom by contrast to 'wise', 'classical', or 'traditional' accounts have been put forward. Some are based on *opinio juris* only,⁹³ while others privilege statements over practice.⁹⁴

Interestingly, many of these revisionist proposals have been geared towards establishing that the sources of IHRL can be customary in nature. Scope precludes addressing this debate in full. What is clear, however, is that customary law requires some form of normative practice to arise and hence the two elements described before.⁹⁵ As a result, replacing practice by sole statements or, worse, by the mere evidence of an *opinio juris* does not fit that requirement. To that extent, the formation of customary IHRL cannot derogate from the two-element approach to customary international law and still be regarded as customary.⁹⁶

Importantly, however, this does not prevent customary international law from being a source of IHRL, and an important one at that.⁹⁷ As a matter of fact, I would like to argue that the two-elements doctrine, as it stands and without revisions, can apply to the intrastate human rights practice shared across States and in fact matches the transnationality of human rights law better than other doctrines of customary law.

The first argument for customary IHRL pertains to the existence of a general and coherent practice of human rights in the world. To start with, custom requires State *practice*, and not necessarily State consent.⁹⁸ The practice underpinning a custom may be a practice of action, but also of abstention or inaction. Thus, even though human rights are usually practised by abstaining from violating them, this cannot be held against understanding those omissions as practice.⁹⁹ Moreover, it is enough for that practice to be *general* and it need not be universal. Thus, even if human rights treaties are not universally ratified, they are at least sufficiently generally ratified to qualify as a general practice. In any case, other kinds of human rights-conforming practice may also be considered. The

⁹³ See Tasioulas, 'In Defence of Relative Normativity', p. 85. See also ICJ, *Nicaragua*, paras 184–92.

⁹⁴ See Meron, *Human Rights and Humanitarian Norms as Customary Law*, p. 93.

⁹⁵ See Gerald J. Postema, 'Custom, Normative Practice, and the Law', *Duke Law Journal* 62 (2012): 707–38.

⁹⁶ See also Simma, *From Bilateralism*, p. 213.

⁹⁷ Contra: Simma and Alston, 'The Sources', pp. 82, 90.

⁹⁸ Contra: *ibid.*, pp. 104–5.

⁹⁹ See ILC, Second Report on Identification of Customary International Law by Michael Wood, Special Rapporteur, 22 May 2014, UN Doc. A/CN.4/672, para. 42. Contra: Simma and Alston, 'The Sources', pp. 103–4.

regional generality endorsed by the UN for representativity purposes, mentioned in section II: The Moral and Legal Nature of Human Rights and the Objectivity of International Human Rights Law, can provide the relevant standard of generality applicable. Finally, in terms of *coherence*, single violations of a customary norm do not imply the non-existence of the norm unless the conditions for a new customary norm are met; that is, general and coherent patterns of violation. In fact, the justifications usually presented for a violation of human rights in practice confirm that those violations are perceived as derogations from an existing normative practice—provided, of course, that some degree of original compliance can be established in the first place. Those justifications and the availability of remedies in case of violation therefore count towards establishing positive consistency.¹⁰⁰

The second argument for customary IHRL does not pertain to the existence of the human rights practice, but to its genre and especially its intrastate and not interstate dimension. Human rights duties are owed primarily to people under a given State's jurisdiction and their practice is intrastate and not interstate, as a result. There are other fields of customary international law such as immunities where the practice underlying customary law is intrastate too.¹⁰¹ Moreover, and in any case, the practice of international organizations, and especially of international human rights' monitoring bodies and courts whether universal or regional, is generally accepted as evidence of interstate practice.¹⁰²

B. *Complementary Human Rights Adjudication*

The mutual validation between DHRL and IHRL also accounts for the specific kind and role of transnational adjudication one encounters in human rights law: complementary adjudication by international and domestic courts.¹⁰³

First, internationally, human rights protection has long been monitored by international (mostly regional so far, however) courts. Those courts review domestic measures for the respect of the minimal human rights standards consolidated in IHRL.

Importantly, international courts' monitoring and interpreting power is subsidiary or complementary to domestic adjudication (and implementation by other

¹⁰⁰ See ICJ, *Nicaragua*, para. 186.

¹⁰¹ See International Law Association, Committee on the Formation of Customary (General) International Law, 'Third Interim Report', in *Report of the Sixty-Seventh Conference* (1996), 623–54, 630.

¹⁰² See ILC, Second Report on Identification of Customary International Law, para. 43.

¹⁰³ See Samantha Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators', in August Reinisch, Mary E. Footer, and Christina Binder, eds, *International Law and . . . , Select Proceedings of the European Society of International Law*, vol. 5 (Oxford: Oxford University Press, 2016), 43–65.

domestic institutions, more generally).¹⁰⁴ International courts may only proceed with their monitoring once domestic judicial remedies have been exhausted ('procedural subsidiarity'). In turn, their review decisions are declaratory (albeit being binding, of course), thus calling for some form of domestic remedial enforcement ('remedial subsidiarity'). Finally, and most importantly, those courts may, and should only offer new interpretations of international human rights law in the course of their monitoring activity when those are based on an existing transnational human rights practice and the common ground arising thereof. In the absence of such a common ground or 'consensus', they should respect domestic authorities' 'margin of appreciation' in specifying and restricting their respective international human rights' duties ('substantive subsidiarity').

As a result, international human rights courts should not be conceived of as ultimate interpreters. They are unlike other international law courts whose interpretative authority derogates from the principle of States' self-interpretation that prevails in international law.¹⁰⁵ Instead, international human rights courts are facilitators of the self-interpretation of IHRL by States: they help crystallize and consolidate States' interpretations of human rights into IHRL *qua* customary law stemming from States' subsequent practice of human rights treaties.¹⁰⁶ Once identified and entrenched as international law, these minimal human rights interpretations can then be imposed on domestic authorities externally.

The complementary nature of international human rights courts' interpretations also explains why the methods they use are often described as being specific, and especially more dynamic, by comparison to those that apply within other regimes of international law.¹⁰⁷ Although they are clearly used more often in IHRL, they are not fundamentally different, however, and their nature may be accommodated by the VCLT's interpretation methods.¹⁰⁸ The interpretation of human rights treaties is indeed best conceived of as a kind of evolutive interpretation (Article 31 (3) (b)

¹⁰⁴ See Samantha Besson, 'Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights?', *American Journal of Jurisprudence* 61 (2016): 69–107.

¹⁰⁵ See Samantha Besson, 'Legal Philosophical Issues of International Adjudication—Getting over the *amour impossible* between international law and adjudication', in Karen Alter, Cesare Romano, and Yuval Shany, eds, *Oxford Companion to International Adjudication* (Oxford: Oxford University Press, 2014), 413–34.

¹⁰⁶ See e.g., ECtHR, *Al-Saadoon and Mufdhi v United Kingdom* (appl. no. 61498/08), Judgment (Fourth Section), 2 March 2010, Reports 2010-II, paras 119–20.

¹⁰⁷ See Başak Cali, 'Specialised Rules of Treaty Interpretation: Human Rights', in Duncan B. Hollis, ed., *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012), 525–48.

¹⁰⁸ See also ILC, Report on the Work of the Sixty-Fifth Session (6 May–7 June and 8 July–9 August 2013) UN Doc. A/68/10, p. 19, para. 16. See Samantha Besson, 'Community Interests in International Law-Making—With a Special Emphasis on Treaty Interpretation and Identification of Customary International Law', in Eyal Benvenisti and Georg Nolte, eds, *Community Obligations in Contemporary International Law* (Oxford: Oxford University Press, 2017), in press.

of the VCLT): it evolves with the subsequent practice of the treaties across States provided that transnational practice reflects an agreement between States which the international human rights courts can identify and validate.¹⁰⁹ This is how the ECtHR approaches what it refers to as the ‘European consensus’, i.e. a form of interpretative custom among States parties.¹¹⁰

Secondly, turning to domestic human rights adjudication, the complementary nature of human rights adjudication by international human rights courts implies a transnational role for domestic courts too.

Domestic courts have the primary responsibility for human rights adjudication and should adjudicate in a way that reflects the complementarity of international adjudication. This is what is implied by all three types of subsidiarity introduced before. To that extent, the existence of the review powers of international human rights courts and bodies depends on the existence of domestic judicial review. This is a consequence of the democratic contextualization of international human rights law, given the crucial role of the judiciary in post-1945 constitutional democracies and the entrenchment of the right to an effective judicial remedy in IHRL.

In fact, domestic courts’ decisions provide the primary contribution to the interpretation of international human rights law in practice. Their relative importance is puzzling to anyone familiar with the role of domestic courts in international law.¹¹¹ To start with, unlike what is the case in other regimes where domestic courts have contributed to the interpretation of international law in practice, the sources of IHRL are largely treaty-based, and in a lesser need of identification and validation, as a result. Moreover, IHRL is one of the few international law regimes with international courts in place (though only regional so far) that exercise compulsory jurisdiction. In this respect again, it is unlike other areas of international law where domestic courts fill the space left by the absence of an ultimate international law interpreter.

The comparative importance of domestic adjudication for IHRL is best accounted for therefore by the transnational and customary nature of IHRL: international human rights courts work as custom-identifiers and –validators, albeit based on domestic human rights courts’ own interpretations and determinations.¹¹² The same could be said about their respective contribution to the development of IHRL *qua* general principles discussed in section II: The Moral and Legal Nature of Human Rights and the Objectivity of International Human Rights Law.

¹⁰⁹ On the role of comparative human rights law, see Besson, ‘Human Rights and Constitutional Law’, pp. 297–9; Besson, ‘Transnational Constitutional Law’.

¹¹⁰ See Ineta Ziemele, ‘Customary International Law in the Case Law of the European Court of Human Rights’, *The Law & Practice of International Courts and Tribunals* 12 (2013): 243–52.

¹¹¹ See Besson, ‘Human Rights’ Adjudication, pp. 52–3. ¹¹² *ibid.*, pp. 49–51.

IV. THE UNIVERSALITY OF HUMAN RIGHTS AND THE GENERALITY OF INTERNATIONAL HUMAN RIGHTS LAW

A third feature of human rights is their universality (section IV.1). It accounts for the general dimensions of the sources of IHRL (section IV.2).

1. Human Rights as Universal Rights

Human rights are best interpreted as the rights everyone has, by virtue of their humanity (e.g. Article 1 of the UDHR). The fact that human rights belong to everyone, wherever they are, is constitutive of their ‘universality’. By contrast, the fact that they belong to them by mere virtue of their humanity, and not of another status such as nationality or citizenship, amounts to their ‘generality’.

The universality of human rights, and their right-holders, should be carefully delineated from that of their duty-bearers and from what one may refer to as the universal scope of human rights duties. While the universality of human rights implies that all States owe human rights duties, it may easily be misunderstood to derive a duty of all States to protect the human rights *of all people* outside of any relationship of jurisdiction between them and those people.¹¹³ The universality of human rights pertains to the scope of human rights-holders and hence is about all persons having the same rights anywhere, i.e. in every State under whose jurisdiction they are situated (e.g. Article 1 of the ECHR; Article 2 (1) of the ICCPR)—whether that jurisdiction is territorial or extra-territorial, of course. It does not require that (all) States owe human rights duties *to all people* at the same time and independently of their jurisdiction. Of course, as I explained before, other States than the first-order human rights duty-bearing State have concurrent second-order rights and, even in some cases, concurrent responsibilities regarding the respect for human rights by that duty-bearing State (e.g. Articles 55–6 of the UN Charter and Articles 40–1 ARSIWA), but this is not what the alleged universality of human rights duty-bearers would amount to.

¹¹³ See Samantha Besson ‘The Extra-Territoriality of the European Convention on Human Rights. Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to’, *Leiden Journal of International Law* 25 (2012): 857–84.

2. International Human Rights Law as General International Law

The universality of human rights-holders accounts for the ‘generality’ of human rights norms and of the sources of IHRL. The third characteristic of IHRL, indeed, is that it is non-relative and that it binds all States (duties *omnium partium* or even *omnium* tout court).

Two qualifications are needed with respect to what the generality of IHRL means in this context.

First, let us take the generality of international law and the sources of IHRL. The generality of IHRL is understood here in the second meaning of ‘general international law’ discussed in section I: Introduction, i.e. as international law that binds all States. What makes things complicated in international law is that not all sources of international law necessarily bind all States. This explains why ‘general international law’, understood by reference to its second meaning, is also used by a further extension (iv) (as explained in section I: Introduction) to refer exclusively to the so-called general sources of international law, i.e. customary international law and general principles. Those two sources are indeed the only ones considered to be such that their norms can bind all States.

This identification between general international law in the second meaning, on the one hand, and customary international law/general principles *qua* sources of that general international law, on the other, explains why the debate about the sources of IHRL is often regarded as begging the question. Because ILHR are universal and IHRL should be such that it can bind all States, then its sources must be the general sources of international law, i.e. customary international law and general principles. The generality of IHRL has implications beyond its sources in customary international law and general principles, however. As I will explain, the practice of human rights treaties also reveals traits of generality. Moreover, the generality of customary international law and general principles only marks the capacity of those sources to produce norms that bind all States. Whether they do also depends on other factors, such as the type or content of the norms or the subjects involved.

Secondly, let us look at the generality of international law and the subjects of IHRL. The question of the generality of IHRL, and the generality of international human rights duties for all States (of jurisdiction), should be kept distinct from the question of the nature of the subjects bearing human rights duties. Based on what I explained earlier about the relationship between meanings (ii) and (iv) of the generality of international law (see section I: Introduction), a common mistake is to think that because general international law in that second meaning *can* bind all subjects, then it necessarily *does* or *should*. In domestic law, we are used to sources of general law being used to produce norms that do not necessarily bind all subjects. Domestic human rights law found in ordinary legislation is a case in point;

domestic legislation may bind all subjects including individuals, but human rights legislation does not, and only binds States and domestic authorities. It is a mistake therefore to assume that if IHRL sources are those of general international law in this second meaning, then IHRL will necessarily bind all subjects of international law, including all international organizations and private actors.¹¹⁴

In fact, States' sole bearing of human rights' duties under the current practice of IHRL is not a matter of sources that may be traced back to the state-oriented nature of international treaties: even when the IHRL applicable belongs to so-called general sources of international law (e.g. is of a customary origin or stems from general principles), its duty-bearers remain States only. In any case, international organizations may conclude international treaties, as exemplified by the international human rights treaties of the European Union (EU), but no other international organization but the EU has concluded such treaties to date. So, the key lies in the type and content of the legal norms at stake, i.e. human rights, and in particular in their egalitarian and institutional nature, and not in their sources (section II: The Moral and Legal Nature of Human Rights and the Objectivity of International Human Rights Law).

There are two aspects of the sources of IHRL that reflect its generality: (a) the generality of customary IHRL; and (b) the consolidation of a universal bill of rights.

A. *General Customary Human Rights Law*

Besides its legislative (non-reciprocal) and transnational (domestic and international) features, customary IHRL reflects the universality of human rights particularly well through the generality of subjects and hence of duty-bearers.

This becomes particularly clear when one looks at how the common critique raised to the generality of international customary law—i.e. the possibility of persistent objection—fails with respect to customary IHRL.¹¹⁵

In short, a persistent objection, provided it is early and consistent, pre-empts the legitimate authority of customary IHRL from arising with respect to a given duty-bearing State and its norms from applying to the objecting State. Of course, it does not prevent that norm from being validated as a customary norm in the first place, and hence from binding other States: the generality of the practice is still enough for a given IHRL custom to arise and claim to bind universally. All the same, a given State may object to being bound by customary norms, thus questioning the latter's general or universal authority.¹¹⁶

In response, one may refer to the contingency of persistent objections in the history of international law. More importantly for its relevance in IHRL, the justification

¹¹⁴ Contra: De Schutter, 'The Emergence', p. 14.

¹¹⁵ See Simma and Alston, 'The Sources', pp. 94–5.

¹¹⁶ See e.g., *Fisheries Case (United Kingdom v Norway)* (Judgment) [1951] ICJ Rep 116, 131.

of persistent objections lies in the history of ILHR themselves. They were indeed meant to protect the right to self-determination of newly created States. It would be paradoxical, therefore, to invoke a persistent objection to IHRL itself, given how closely related IHRL is to democracy and the right to self-determination in the first place. As a matter of fact, persistent objections have almost never been invoked in the context of IHRL and, when they have, they have not been acknowledged. For instance, South Africa objected to the customary prohibition of apartheid, but was still held to be in violation thereof.¹¹⁷ In short, it would amount to an abuse of the democratic justification of State consent and persistent objection to invoke them against the authority of IHRL and hence against the international guarantee of self-determination itself.¹¹⁸

In reaction to some authors' resistance to the former arguments, one should emphasize the importance of regional customary law in consolidating universal customary IHRL.¹¹⁹ This is, for instance, clearly the case of the practice surrounding the ECHR and the 'European consensus' I referred to earlier, but the same may be observed in other regional human rights systems. While those regional customs may not yet present together the degree of universality one would expect of IHRL, the practice of IHRL shows that the transnational consolidation of ILHR from DHRL has first occurred at intermediary regional levels before being universalized further through international human rights courts and bodies. This is also how international human rights treaties developed, first through regional treaties in the 1950s, and then only through international ones from the late 1960s. As a matter of fact, the orientation of the ECtHR, for instance, in its identification of the existence of a European consensus, and hence of the practice and *opinio juris* constitutive of the European human rights custom, is universal, thereby encouraging the universal consolidation of the practice; this may be verified from the sources of IHRL used and the *soft law* instruments considered in the case law.¹²⁰

B. *The Integrated Universal Bill of Rights*

International human rights treaties do not stand alone in the sources of IHRL. Not only do they constitute a network of overlapping treaties with various States parties

¹¹⁷ See Simma, *From Bilateralism*, p. 289.

¹¹⁸ See on the inherent democratic limits to State consent, Besson, 'State Consent and Disagreement', pp. 309–12.

¹¹⁹ See Besson, 'The Influence of the UN Covenants'. On the role of comparative human rights law, including comparative regional human rights law, in the sources of IHRL, see Samantha Besson, 'Comparative Human Rights Law – Human Rights Law as a Comparative Project', in Matthias Reimann and Reinhart Zimmermann, eds, *Oxford Handbook on Comparative Law*, 2nd edn (Oxford: Oxford University Press, 2018), forthcoming.

¹²⁰ See ECtHR, *Demir and Baykara v Turkey* (appl. no. 34503/97), Judgment (Grand Chamber), 12 November 2008, Reports 2008-V, paras 85–6. See also Ziemele, 'Customary International Law'.

adding up, but they also coexist with IHRL stemming from other clearly general sources of IHRL such as customary international law and general principles.

Both characteristics reflect the universality of human rights. Separately or together, they contribute to expanding the scope of human rights duty-bearing States of each respective human rights treaty and give rise to human rights duties *omnium (tout court)*. While the former seems to be in contradiction with the treaty-law principle that treaties do not give rise to duties for third States (Articles 34–7 of the VCLT), the latter may be justified on the grounds of the reference, under the VCLT, to the corresponding customary duties whose third-party effects derive from their concurrent customary nature (Article 38 of the VCLT).

First, let us look at the human rights treaties' network. This network is usually approached as a 'universal bill of rights' made of so-called 'core human rights treaties' and the UDHR. The latter and some of the core human rights treaties in fact have a universal or near-universal rate of ratification, but others do not; hence, presumably, why some authors consider grouping them together or 'integrating' them even further.¹²¹ The idea of an integrated network is echoed by the widespread reference to the 'UN human rights treaty system'.¹²² This is particularly the case in the monitoring made by the HR Council on the basis of the UDHR as a catalyst of all UN human rights treaties independently of whether a given State is a State party thereof.¹²³

A concrete example of how this universal bill of rights works can be found in the practice of interpretation of human rights treaties, and in particular their systemic interpretation by reference to 'any relevant rules of international law applicable in the relations between the parties' (Article 31 (3) (c) of the VCLT). The practice of human rights treaties' interpretation takes the principle of systemic integration further in the direction of universal integration. Indeed, this kind of systemic integration routinely occurs independently from the condition that the other treaties by reference to which they are interpreted are concluded *between the parties*.¹²⁴

Secondly, we turn to the coexistence, but also, most importantly, the combination of international human rights treaties with other sources of IHRL. It is another feature of IHRL that warrants the existence of a universal bill of rights binding all States. Sources of IHRL are not only concurrent or juxtaposed as they are in other regimes of international law,¹²⁵ but they actually interact with one another. This is the case, most clearly, of the mutual constitution between customary human rights law and human rights treaties. The codification of customary international law and

¹²¹ See e.g., Brems, 'Should Pluriform Human Rights Become One?'; Higgins, 'Human Rights', p. 7.

¹²² See e.g., Chinkin, 'Sources', p. 78.

¹²³ See HR Council Resolution 5/1, Appendix. See also Simma and Alston, 'The Sources', p. 99.

¹²⁴ See e.g., *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Judgment, Merits) [2010] ICJ Rep 639, para. 68; ECtHR, *Case of the National Union of Rail, Maritime and Transport Workers v United Kingdom* (appl. no. 31045/10), Judgment (Fourth Section), 8 April 2014, Reports 2014-II, paras 76 and 98.

¹²⁵ See ICJ, *Nicaragua*, para. 177.

the ‘customization’ of international treaties are well-established mutual processes of international law-making in the human rights context.¹²⁶ It is common indeed to consider that the network of human rights treaties has become of a customary nature, by crystallization or by accretion, starting from the UDHR in 1948 and certainly from the UN Covenants in 1966 and the other UN human rights treaties adopted since then.¹²⁷ Another case in point, discussed in section III: The Dual Legality of Human Rights and the Transnationality of International Human Rights Law, is the identification of customary IHRL and its consolidation into treaty interpretations through the evolutive interpretation of human rights treaties by reference to States’ subsequent practice.

Interestingly, this combination does not only lead to the ‘customization’ of human rights treaties, but also conversely to the ‘generalization’ of human rights treaties themselves. Usually, indeed, the UDHR and the human rights treaties remain the sources invoked *qua* universal bill of rights. So, what is at stake is the generalization of treaty duties themselves into what may be referred to not so much as a distinct source of IHRL, but as a generalized source thereof or an ‘objective regime’ of IHRL. This comes very close to considering human rights treaties as the ‘legislative enactments’ which H. L. A. Hart was missing, but also calling for with respect to international treaties in 1961.¹²⁸

V. CONCLUSION

The practice of IHRL demonstrates three specificities in terms of sources that correspond to and are accounted for by three features of human rights: its sources are objective, and this corresponds to human rights’ dual moral and legal nature; they are transnational, and this corresponds to how human rights straddle domestic and international law; and they are general, and this corresponds to human rights’ universality.

Those specificities were mapped and discussed within the framework of the sources of general international law, and no new source of IHRL was identified in that context. While some may be subsumed, I have argued, under those sources of general international law, as it is the case for intrastate custom or general principles, others are more difficult to account for, and especially those pertaining to treaty law.

¹²⁶ See *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgment) [1969] ICJ Rep 3, 41, paras 70 ff.

¹²⁷ See ICJ, *Barcelona Traction*, paras 33–4.

¹²⁸ H. L. A. Hart, *The Concept of Law*, 2nd edn (Oxford: Oxford University Press, 1994), p. 236.

There are four possible ways of explaining those remaining IHRL specificities from the perspective of the general rules of international law or, more precisely, of the general international law on sources.

First, one may consider that they are compatible with general international law either as an authorized *lex specialis*, through State consent or by reference to the 'object and purpose' of the norm in question (Article 31 (1) of the VCLT). The difficulty is that many of the practises discussed in this chapter are in fact derogatory, without fitting these forms of justification. So, this understanding may account for some, but certainly not for all specificities of the sources of IHRL, especially under treaty law.¹²⁹ Secondly, one may approach those unjustified derogations from general international law as new rules or principles of general international law on sources. This may be the case of some of the ILC's proposals regarding reservations to treaties, but does not by far cover all the specificities discussed in this chapter.¹³⁰

Thirdly, one may consider that the sources of IHRL are so special that they have turned IHRL into a self-contained or autonomous regime and thus into a 'system' of its own.¹³¹ The difficulty with this understanding is that IHRL norms are regularly, and at the same time, interpreted as being the norms of a regime of *international law* and not of a self-standing system. This is the case with the ways in which IHRL interpretation itself is framed under the VCLT, in which responsibility in case of violation thereof is adjudicated or in which its relations to other regimes of international law are organized. So, IHRL is mostly considered a distinct regime to the extent that it has its own subject matter, but it is not usually approached as autonomous as in having developed its own sources, and rightly so.

Finally, and more radically, one may consider that the specificities of the sources of IHRL have in fact turned them into general international law. What looks different may be standard. This may be because subjective, interstate, and relative international law(-making) has become rarer than it used to be. As a matter of fact, many of the features discussed in this chapter are shared by an increasing number of other norms and regimes of international law. Think of legislative treaties, of intrastate custom, or of judicial law-making. But maybe not. The boot may be on the other foot: that of general international law and its existence in the first place. If there is such a thing as a general international sources law, those sources would have to be objective, transnational, and general or, at least, include such sources. For general international law to be general in a meaningful sense, its material and functional generality requires that at least parts of it (i) be made independently from reciprocity; (ii) be anchored within domestic legal orders or, at least, in some form of inclusive or even democratic process; and (iii) be universal in scope. Of course, some sources of international law already fit those requirements, but not all

¹²⁹ See also the conclusions in Chinkin, 'Sources'.

¹³⁰ See Kamminga, 'Final Report', pp. 7–14, 21–2.

¹³¹ See De Schutter, 'The Emergence', pp. 1, 47.

do, and bilateral treaties are a case to point. To the extent that some regimes, like IHRL, are based on all sources available in international law and that their duties are non-reciprocal, general international law is no longer general enough to include those regimes. If that is so, one may consider that IHRL is, in fact, the central case of general international law and that the general international sources law needs to be reconceived to adapt to IHRL.

This fourth interpretation is the right one, I propose. It applies, at least, to the specificities in the sources of IHRL that may not be accounted for on grounds of a *lex specialis* rule or on other authorized grounds. What this means then, is that the general international law on sources may not be as rigid as one often assumes and need not be approached in a monolithic way. It can admit of greater variety across regimes of international law than usually granted, just as the general law on sources does, as a matter of fact, between domestic legal orders.

If I am right, IHRL is the new general international law, and so are its sources. This conclusion is in line with the pivotal role of human rights in the international legal order. After all, the inherently justificatory nature of human rights has implications for how we justify IHRL in the first place and, in turn, their legitimating function affects how we account for IHRL's legitimate authority. It should not come as a surprise therefore that the indirect law-making role of human rights-holders through the sources of international law also has some implications for IHRL's own sources.

RESEARCH QUESTIONS

- Some specialists of international human rights law argue that the sources of that law make it a 'self-contained regime'. How exactly should one develop such an argument? And what are its implications for general international law?
- Provided there are differences between the sources of international human rights law and those of other regimes of international law, may these differences be justified? What are these justifications?

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